

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

Investigation into regulation of Voice over)
Internet Protocol ("VoIP") services)

Order entered: 2/11/2011

ORDER DENYING MOTION TO ALTER

I. INTRODUCTION

In this Order, we deny a request from Comcast Phone of Vermont, LLC ("Comcast Phone" or the "Company") to alter our Order issued in Phase I of this Docket because the Company has failed to demonstrate the existence of a manifest error of law that would warrant granting such relief.

II. BACKGROUND

On October 28, 2010, we issued an Order in which we concluded that the Voice over Internet Protocol ("VoIP") services presently offered in Vermont constitute "telecommunications services" under Vermont law and therefore are subject to our regulatory jurisdiction to the extent that it has not been preempted by federal law.¹ We further determined that while our state-law-based regulation of "nomadic" VoIP largely has been preempted by federal law, such federal preemption has not attached for state-law-based regulation of "fixed" VoIP services such as the Comcast Digital Voice ("CDV") service offered by Comcast Phone in Vermont.²

On November 12, 2010, Comcast Phone filed a motion pursuant to V.R.C.P. Rule 59(e) (the "Comcast Motion") seeking to alter the Phase I Order. The Comcast Motion alleges three points of error in the Phase I Order: (1) the Board's conclusion — as characterized by Comcast Phone — that the Federal Communications Commission ("FCC") is barred from preempting state regulation of VoIP except in cases where it is not feasible to separate intrastate from interstate

1. Docket 7316, Order of 10/28/10 at 21 and 43 (the "Phase I Order").

2. *Id.* at 25 and 43.

calling traffic for jurisdictional purposes; (2) the Board's decision declining to analyze whether CDV is an "information service" as defined by federal law; and (3) the Board's decision to exclude from evidence the supplemental testimony of Comcast Phone witness, David Kowolenko.

On December 10, 2010, the Vermont Department of Public Service (the "Department") filed a response opposing the Comcast Motion, as did the Eight Independent Vermont Incumbent Local Exchange Carriers (the "Independents"). The Department and the Independents argue that the Comcast Motion should be denied because the Company has failed to meet the standard for relief under Rule 59(e), and instead has made a filing containing arguments that do not differ from those previously raised by Comcast Phone and decided by the Board in the Phase I Order. Both the Independents and the Department maintain that Comcast Phone's request for reconsideration rests on a mischaracterization of the Board's preemption analysis as set forth in the Phase I Order. According to both parties, the Board correctly concluded that it is not preempted from exercising state-law-based jurisdiction over a fixed VoIP service, and properly refrained from deciding whether CDV qualifies as an "information service" or a "telecommunications service" under federal law. Finally, the Department and the Independents agree that there was no error in the Board's decision to exclude from evidence the supplemental testimony from witness Kowolenko.

III. DISCUSSION

A motion filed pursuant to V.R.C.P. 59(e) to alter or amend a judgment is addressed to the sound discretion of the court.³ It is a procedural rule that codifies a court's inherent power to "open and correct, modify or vacate its judgments."⁴ The purpose of Rule 59(e) is to allow the court to avoid the unjust result arising from the mistake or inadvertence of the court and not the fault or neglect of a party.⁵ Under Rule 59(e), the Board "may reconsider issues previously

3. *Gardner v. Town of Ludlow*, 135 Vt. 621 (1973). Vermont Rule of Civil Procedure 59(e) is applicable to Board proceedings pursuant to Vermont Public Service Board Rule 2.105.

4. *Osborn v. Osborn*, 147 Vt. 432, 433, 519 A.2d 1161, 1162-63 (1986).

5. *Id.*

before it, and generally may examine the correctness of the judgment itself."⁶ The Vermont Supreme Court has long warned that this power of reconsideration "should be used with great caution."⁷ It is not intended to permit parties to simply relitigate issues.

The Comcast Motion returns to the Company's argument that we are preempted from regulating CDV as a "telecommunications service" pursuant to Vermont state law because Comcast Phone's CDV service is properly classified as an "information service" pursuant to federal law.⁸ Thus, according to Comcast Phone, any attempt to regulate CDV service pursuant to Vermont state law necessarily would conflict with, and therefore be preempted by, the FCC's "deregulatory policies" with regard to "information services."⁹

In reiterating these arguments, the Company first assigns "plain error" to a passage in the Phase I Order stating that "Comcast IP's CDV service lies beyond the reach of the FCC's power of preemption" because "jurisdictional separation is possible."¹⁰ Comcast Phone insists that "[t]he FCC's power to preempt state law is *not* limited to situations where it is impossible to distinguish interstate from intrastate communications."¹¹

We reject Comcast Phone's claim of "plain error" because it rests on a selective reading and mischaracterization of the Phase I Order. Comcast Phone has confused our ruling concerning "impossibility" preemption — which, as we determined in the Phase I Order, does not bar an assertion of our state-law-based jurisdiction over a fixed VoIP service such as CDV — with "conflict" pre-emption — the applicability of which we have not yet ruled upon in this Docket.¹²

6. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54; 573 A.2d 1188, 1192 (1990) (citations omitted).

7. *Haven v. Ward's Estate*, 118 Vt. 499, 502; 114 A.2d 413, 415 (1955).

8. Comcast Motion at 6-9.

9. *Id.* at 6.

10. Comcast Motion at 2 (*citing* Phase I Order at 26 and 28).

11. *Id.*

12. The preemption doctrines of "conflict" and "impossibility" represent but two of several "varieties" of preemption identified by the U.S. Supreme Court, any one of which, under appropriate circumstances, may oust state jurisdiction in favor of a federal law enacted by Congress or a federal regulation promulgated by a federal agency

The two quotations cited by Comcast Phone were taken from separate pages of an eight-page analysis in the Phase I Order (p. 23-29) discussing the FCC's invocation of the "impossibility" justification in *Vonage* for preempting state-regulation of nomadic VoIP. When read in full context, the language Comcast Phone claims to be indicative of error simply reinforces the point that the "impossibility" type of federal preemption asserted by the FCC in the *Vonage* Order does not apply to a fixed VoIP service such as CDV, and therefore does not operate to exempt CDV from state telecommunication regulation. We find Comcast Phone's efforts to read any error into this language to be unavailing and therefore deny the Company's request to alter the Phase I Order on this basis.

Comcast Phone mischaracterizes the Phase I Order in arguing that we have committed error by supposedly foreclosing all possibility of federal law preemption as a bar to state-law regulation pursuant to 30 V.S.A. § 203(5).¹³ We have not flatly ruled, as Comcast Phone claims,

acting within the scope of its congressionally delegated authority. *See Louisiana Pub. Serv. Comm'n v. FCC et al.*, 476 U.S. 368-369 (1986). Relying on the *Louisiana* decision, Comcast Phone argues that it is "irreconcilability" between federal and state regulation that justifies preemption, and not "the ability to distinguish between intrastate and interstate communications." Comcast Motion at 3-5. This position ignores that the *Louisiana* decision recognizes both theories — irreconcilability (a.k.a. conflict) and impossibility — as valid, alternative grounds for federal preemption. *Louisiana*, 476 U.S. at 368-369. Comcast Phone's argument is further at odds with the FCC's holding in the *USF Order*, in which the feasibility of jurisdictional separations was pivotal to the issue of whether it would assert preemption over a VoIP provider's service:

[A]n interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage* Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage* Order would no longer be applicable to such an interconnected VoIP provider.

Universal Serv. Contribution Methodology, 21 F.C.C.R. 7518 at ¶ 56 (2006); *rev'd on other grounds*, 489 F.3d 1232 (2007).

13. *See* Comcast Motion at 2-5. In this part of its motion, Comcast Phone argues that we made a "mistake" in observing that the *Louisiana* court expressly cited certain cases from North Carolina "as examples of legitimate FCC preemption because separations was not possible." Comcast Motion at 5. We perceive no error in our reading of the *Louisiana* decision. Phase I Order at 28 n. 52. In any event, the language of the *Louisiana* decision speaks for itself. *See Louisiana*, 476 U.S. at 376 n. 4.

Comcast Phone also discusses at length the case of *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1040 (4th Cir. 1977), a decision that reflects the FCC's success in asserting preemption due to a conflict between federal and state regulatory policy. *Id.* at 1040 (upholding FCC preemption of state regulation of telephone terminal equipment used for both interstate and local communication "when such regulation conflicts with federal rules governing the same equipment.") Because our Phase I Order expressly provides that Comcast Phone will have

that because jurisdictional separations is possible in the case of fixed VoIP, the FCC has no power at all to preempt our regulation of Comcast Phone's CDV service pursuant to Vermont state law.¹⁴ This is evident from our direction to the Hearing Officer to afford Comcast Phone "an opportunity to raise any preemption concerns it may have" about any of the regulatory proposals based on our state-law jurisdiction that are identified in the next phase of this Docket.¹⁵ Thus, the Company's claim of error ignores this two-phased approach to examining our jurisdiction in this investigation.¹⁶ We remain mindful that conflict preemption may yet attach to bar the exercise of our regulatory jurisdiction based on Vermont law, in the event that a regulatory proposal is put forward in Phase II that proves to be "irreconcilable" with pertinent federal law or lawful FCC regulation.

Our two-step approach to preemption analysis finds support in the recent FCC decision authorizing Nebraska and Kansas to subject the intrastate revenues of nomadic VoIP providers to state Universal Service Fund regulation.¹⁷ As the Comcast Motion points out in citing the *Nebraska USF Decision* with approval, "the ability to separately identify intrastate calls was only the first step" in determining the scope of the states' regulatory authority.¹⁸ Having determined that such separation was possible, the FCC decided it would not preempt the states from

an opportunity to make additional preemption arguments — including conflict preemption — there is no need at this time to address Comcast Phone's assertions that the *Louisiana* and *North Carolina* decisions must be read to support "FCC preemption in situations where jurisdictional separation was plainly possible." Comcast Motion at 3.

14. Comcast Motion at 2.

15. Phase I Order at 38.

16. In this first phase, we have concluded that jurisdictional separation of fixed VoIP call traffic is possible, and that therefore the "impossibility" variety of preemption asserted by the FCC in *Vonage* does not attach to bar our ability to regulate fixed VoIP as a "telecommunications service" pursuant to Vermont state law. Phase I Order at 20 and 25-26. In the next phase, we will determine what regulatory policies, if any, we should adopt with regard to fixed VoIP, assuming there is no showing that such policies are preempted by federal law, whether due to conflict or other grounds. Phase I Order at 38.

17. *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, FCC No. 10-185 (rel' d Nov. 5, 2010) (hereinafter the "*Nebraska USF Decision*").

18. Comcast Motion at 5.

imposing universal service contribution obligations on nomadic VoIP providers, so long as these obligations did not conflict with "federal contribution rules and policies governing interconnected VoIP service."¹⁹ Thus, the FCC's two-step approach to analyzing preemption in the *Nebraska USF Order* all but mirrors the two-phased approach contemplated in our Phase I Order.²⁰

Turning now briefly to Comcast Phone's request for reconsideration of our decision not to determine whether CDV qualifies as an "information" service under federal law, we observe that the Company has advanced no new arguments on this point. The Company merely persists in asserting — still without binding authority or compelling rationale — that we are "obligated" to conduct this classification analysis and that we cannot "avoid doing so where, as here, the facts and circumstances require."²¹ We still are not persuaded by Comcast Phone that any such requirement exists, given that this classification analysis has played no role in the FCC's VoIP preemption decisions — a fact that the Company continues to studiously pass over.²²

In the Comcast Motion, the Company now acknowledges that "the FCC has not yet classified interconnected VoIP as an information service." Nonetheless, Comcast Phone accords no significance to this fact, or to the existence of the pending proceeding before the FCC in which the federal-law classification of VoIP is under consideration. Simply put, Comcast Phone has failed to offer any reason for why we should not defer to the FCC on the question of classification.²³ Therefore, we decline to reconsider our decision to defer to the FCC's classification proceeding, and, consequently, we find no error in our decision to apply state law

19. *Nebraska USF Decision* at ¶¶ 15-16.

20. We further note that the Maine Public Utilities Commission recently issued a decision finding it has state-law-based jurisdiction to regulate fixed VoIP and that such regulation is not preempted by federal law. The Maine Commission's framework for analyzing the preemption issue was very similar to the paradigm we used in the Phase I Order. See *Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Voice" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, Order (Maine Publ. Util. Comm. Oct. 27, 2010).

21. Comcast Motion at 9.

22. See Phase I Order at 27 and 37-38. We further observe that the FCC also did not take up the classification issue in its recent *Nebraska USF Decision*.

23. Phase I Order at 29 and 38.

until such time as the FCC issues an order on the classification issue that might prompt us to reconsider the extent to which our state-law jurisdiction to regulate VoIP may be preempted.²⁴

In sum, for the reasons discussed in this order, the Comcast Motion is denied.

So ORDERED.

Dated at Montpelier, Vermont, this 11th day of February, 2011.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: February 11, 2011

ATTEST: s/ Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

24. Consequently, we further find no error in our decision to exclude the supplemental testimony of Comcast Phone witness David Kowolenko from the evidentiary record and to not adopt the proposed Comcast Phone findings based on that testimony.